IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY J. DAHL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2724

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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STATEMENT OF THE CASE.

The plaintiff in error, Harry J. Dahl, was indicted with William A. McGee on the 19th day of March, 1915, for violation of Section 37 Penal Code, for conspiracy to violate Section 11 of the Chinese Exclusion Act, with the purpose and object of smuggling Chinese into the United States and aiding and abetting such smuggling.

The indictment contained three counts in the usual and ordinary terms charging conspiracy and describing the overt acts. The three counts are based upon separate conspiracies of as many different dates, charging a purpose to bring in "certain Chinese alien persons not lawfully entitled to enter the United States, and not entitled to be or remain in the United States at all." No names of the objective Chinese are stated.

Two overt acts are charged under Count I; seven under Count II; and eight under Count III. The errors assigned apply equally to all three counts, with the exception of number four, which applies only to Count III.

Count III is based upon the conspiracy of the 18th of February, 1915, in pursuance of which eight certain overt acts are alleged, involving the actual smuggling in of four Chinese; and it was regarding these eight overt acts that the evidence objected to as inadmissible was received.

The trial was had on June 3-4, 1915, during which the Court, upon objection to the admission of the evidence complained of, instructed the jury that they should only consider it with respect to the conspiracy charged in the indictment, and distinctly stated that the defendant was not on trial for smuggling the Chinese into the United States. The

bill of exceptions and transcript are silent upon this point. At the time of offering the evidence complained of, counsel for the United States distinctly stated that it was only offered as part of the res gestae and for the purpose of throwing light upon the acts of the defendants in connection with the conspiracy charged.

The evidence in the case, as shown by the transcript, discloses a close relationship between the two defendants extending over a period of some four months, during which they did many acts clearly showing the conspiracy charged. These facts cover matters extending over the period before the conspiracy was actually entered into and after the object was consummated.

The jury returned a verdict of guilty on all three counts.

ARGUMENT.

POINT I. SUFFICIENCY OF THE INDICTMENT.

Plaintiff in error attacks the sufficiency of the indictment on the ground that it does not aver that the names of the persons to be smuggled into the United States were unknown to the grand jurors, and that its language excludes the theory that the

conspiracy contemplated bringing in all or divers and sundry Chinamen who might be desirous of entering. This contention was presented to the presiding judge at the trial and has been ruled upon adversely in all its phases. (Transcript p. 24. Reported in 225 Fed. 909, *U. S. vs. Dahl*). It is clear from the language of the indictment, as pointed out by the court in its opinion, that the conspiracy was to bring in certain Chinese whom the conspirators might have in hand on the date the journey was to begin. It is difficult to conceive how the defendant could have been more directly informed of the elements of the offense than by the use of the language employed. This language is almost identical in letter with that used in

Wong Din vs. U. S., 135 *Fed.* 702.

which practice is favorably reflected in *Williamson vs. United States*, 52 *L. Ed.* 278. The object in criminal pleadings is to furnish the accused with such a description of the charge as will enable him to make his defense, avail himself of his conviction or acquittal against any prosecution for the same cause, and inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction. The defendant is protected not only by the language used, but also by his right to show by evidence on a subsequent charge that he has

been in former jeopardy, and although the three specific charges of conspiracy may be termed general in their nature, to the extent that they contemplate the smuggling of unknown Chinese, the facts in both cases would clearly show former jeopardy.

Any doubt as to the sufficiency of a conspiracy indictment in the particulars mentioned, has long since been settled by the case of

Williamson vs. U. S., 207 *U. S.* 425, 52 *L. Ed.* 278.

This was a case of conspiracy to bring about the subornation of perjury. The defendant Williamson and others were charged with conspiring to procure certain persons *not named* to make false affidavit under the Timber and Stone Act that the affiant was not making entry for any other person or for the benefit of any other person. The case was reversed upon the ground that the affidavit in question was not required by any law, and that perjury or subornation could not therefore be predicated upon the making of such a false affidavit. The sufficiency of the indictment, however, was questioned and on all points raised was sustained. The indictment not only failed to set out the names of the persons who were procured to make the false affidavit, but there was *no allegation* that the names were *unknown*, to

the grand jurors. The Court in sustaining this indictment said,

> "These allegations plainly import and they are susceptible of no other construction than that the unlawful agreement contemplated a future solicitation of individuals to enter land * * * There is no reason to infer that the details of the unlawful conspiracy and agreement are not fully stated in the indictment, and it may therefore be assumed that the persons who were to be suborned, and the time and place of such subornation had not been determined at the time of the conspiracy * * * It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time or place of such suborning should have been agreed upon; and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment we think sufficiently set forth such purpose. The assignments of error which assail the sufficiency of the indictment are, therefore, without merit."

In 5 Ruling Case Law 1083, it is stated that in a charge of conspiracy, the particular crime which is the object thereof must be named, but need not be set out with the same particularity as in an indictment for the specific crime itself. This is the rule followed in a long line of conspiracy indictments:

Ching vs. U. S., 118 *Fed.* 540.

U. S. vs. Stevens, 44 *Fed.* 141.

U. S. vs. Wilson, 60 *Fed.* 890.

Pettibone vs. U. S., 37 *L. Ed.* 419.
Wong Din vs. U. S., 135 *Fed.* 702.
Williamson vs. U. S. 52 *L. Ed.* 278.

Furthermore, if the defendant conceived that he was at a disadvantage on account of the failure to name the Chinese who were to be smuggled into the United States, in pursuance of the conspiracy charged in any of the three counts, his remedy was by Bill of Particulars, which would afford him information upon that or any other doubtful matter.

Mounday vs. U. S., 225 *Fed.* 965.
Dunbar vs. U. S., 39 *L. Ed.* 390.
Bartell vs. U. S., 57 *L. Ed.* 583.
Rosen vs. U. S., 40 *L. Ed.* 606.
Durland vs. U. S., 40 *L. Ed.* 709.
U. S. vs. Bennett, F. C. 14571.

Under the above authorities, the indictment is clearly sufficient.

POINT II. ERROR IN ADMITTING CERTAIN EVIDENCE.

Under the premise that nowhere does the indictment charge that any Chinamen were actually brought into the country, and that neither by direct statement or possible inference can it be gathered

from the indictment that the purpose of the conspiracy was consummated by the actual bringing in of Chinamen, plaintiff in error alleges that the admission of the evidence set forth in the Transcript, page 39-41, was prejudicial error. This premise is born of the erroneous assumption that the admission of evidence of a consummated offense under an indictment charging conspiracy, is improper, therefore, the premise being erroneous, the argument and conclusion is erroneous.

In the very case cited in counsel's brief, *Williamson vs. United States*, 52 L. Ed. 278, the rule is laid down that evidence of other crimes is not prejudicial when it tends to show the crime charged and is properly limited on the trial by the judge. As stated before, the evidence complained of was offered and admitted under instructions by the Court to the jury that they should consider it only for the purpose of determining whether or not the conspiracy charged actually existed, and that the fact that the defendants might be guilty of an offense of smuggling in Chinese should not influence them in their verdict upon the conspiracy charge, except as showing preconcerted action and agreement. The evidence admitted was so inseparably linked with the overt acts charged in Count III, that it was eminently proper to admit the same.

In the consideration of conspiracy charges, the text writers and courts uniformly say that direct evidence of a conspiracy is the exception, and that it is usually proven by the acts of the conspirators which show a preconcert. They likewise hold that evidence of other offenses are admissible, especially when they are involved in the res gestae. As stated in

Clune vs. U. S., 40 *L. Ed.* 269.

> "Where a case rests upon circumstantial evidence much discretion is left to the trial court, and its ruling admitting such evidence will be sustained if the evidence admitted tends even remotely to establish the ultimate fact."

Wharton's Criminal Law 10*th Edition Sec.* 1401.

Second Bishop's New Criminal Law, Sec. 227 (2).

Russel on Crimes (1896 *International Edition*) 533.

Alkon vs. U. S., 163 *Fed.* 810.

Smith vs. U. S., 157 *Fed.* 721.

Davis vs. U. S., 107 *Fed.* 753.

Prettyman vs. U. S., 180 *Fed.* 30.

Robinson vs. U. S., 172 *Fed.* 105.

Pettibone vs. U. S., 37 *L. Ed.* 419.

U. S. vs. Breese, 173 *Fed.* 402.

U. S. vs. Cole, 153 *Fed.* 801.

U. S. vs. Richards, 149 *Fed.* 443.
U. S. vs. Heike, 57 *L. Ed.* 450.
Robinson vs. U. S., 172 *Fed.* 105.
Ryan vs. U. S., 216 *Fed.* 30.
U. S. vs. Rogers, 226 *Fed.* 512.
People vs. Molineux, 62 *L. R. A.* 193.
Thiede vs. Utah, 40 *L. Ed.* 242.

In the Heike, Richards, Davis, Robinson, Ryan and Rogers cases, supra, evidence of the consummated offenses, as well as other crimes, was received and held properly admitted. It is inconceivable that a conspiracy could be shown without admitting evidence of acts involving in most cases the consummated offense.

Section 37 of the Penal Code says:

> "If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do *any* act to effect the object of the conspiracy"

each of the parties to the conspiracy shall be deemed guilty.

In order to properly charge conspiracy, an overt act must be alleged. Under the statute, *any* overt act may be alleged; if it is permissible to allege any overt act, certainly an overt act involving the consummated offense may be both alleged and proved.

The government is not required to elect *one* of any number of overt acts and allege only that one. Under the authority of

Houston-Bullock vs. U. S., 217 *Fed.* 852.

evidence of overt acts other than those charged in the indictment is admissible. The evidence received in this case and relied upon as prejudicial error was part of the res gestae and indissolubly connected therewith. It bore materially upon the object and purpose of the conspiracy charged in Count III and under the authority of the Williamson case, 52 L. Ed. 291, was properly received. As stated in that case, as well as in the Clune case, supra, great latitude must be allowed in the reception of circumstantial evidence, the modern tendency both of legislation and of the decisions of courts being to give as wide a scope as possible to the investigation of facts without working injustice to the defendant.

Conspiracy is an exclusive offense, intended to punish a criminal scheming, and that scheming can only be shown by the acts of the conspirators, which unerringly direct our intelligence toward the preconcert. While proof of the conspiracy embraces in its details the consummated offense, in most instances, the latter is only a circumstance pointing to the former.

Britton vs. U. S., 27 *L. Ed.* 699.

In the case of *Houston-Bullock vs. United States*, 217 *Fed.* 852, it is held that evidence of any overt act in pursuance of the conspiracy is proper, together with all its incidental matters. The Court at page 858 says:

> "We find no error in the assignment that evidence was admitted of overt acts other than those which were pleaded in the indictment. No decision of the federal court is cited in which it has been held that in such a case the prosecution is limited to proof of the overt acts which are specifically charged."

and concludes by citing other cases showing the contrary, including *Heike vs. U. S.*, 57 L. Ed. 450. The Court further says:

> "That the language of Section 5440 indicates that Congress did not intend to change the common law rule (permitting evidence of all overt acts tending to prove the conspiracy) further than to make it essential to the offense described therein that there should have been at least one overt act to effect the object of the conspiracy."

In view of the above authorities, the reception of the evidence in regard to the actual smuggling of the Chinese, and of their alien status was entirely proper.

It has been held in

Steigman vs. U. S., 220 *Fed.* 67.

and *Heike vs. U. S.*, supra, that an indictment for conspiracy which shows in charging overt acts that a completed offense was committed, is not duplicitous.

Finally, if we admit for the sake of argument that the admission of the evidence complained of was error, an examination of the transcript will show that it was harmless error, and not prejudicial to the defendants, in the face of the evidence which had been previously admitted, since the record clearly shows a chain of facts and circumstances convincing beyond every reasonable doubt and the evidence complained of could have only been cumulative. Where the evidence, independent of that charged as erroneous, unquestionably supports the verdict of guilty, the error in admitting such items of merely cumulative evidence is not prejudicial.

As stated in Jones on Evidence, Vol. 5, 388, Sec. 896:

> "Where the exceptionable evidence is of little weight compared with the rest of the proof, and the whole clearly justifies the finding of the jury, a new trial will not be granted, but it must satisfactorily appear that the verdict must and ought to have been the same whether the questionable evidence was admitted or not."

This authority while largely treating of civil evidence, includes the criminal practice generally.

It is submitted that the rule stated is proper in this case, as the following cases show:

Stern vs. U. S., 193 *F.* 888.
Krause vs. U. S., 147 *F.* 442.
Thompson vs. U. S., 144 *F.* 14.
Calicchio vs. U. S., 189 *F.* 305.
Certiorari denied, 56 *L. Ed.* 1269.
Tubbs vs. U. S., 105 *F.* 59.
Brown vs. U. S., 142 *F.* 1.
Sawyer vs. U. S., 50 *L. Ed.* 972.
Pa. Co., vs. Ray, 26 *L. Ed.* 141.

In *Myers vs. U. S.*, 223 Fed. 919, the Circuit Court of Appeals for Second Circuit says:

> "Every element of the statutory offense has been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal."

It is respectfully submitted, in view of the above authorities and the final point that a conspiracy continues so long as any overt act is committed in furtherance of it, that the evidence complained of was properly admitted.

POINT III. ERROR IN DENYING MOTION FOR DIRECTED VERDICT; FOR JUDGMENT NON OBSTANTE VERDICTO; IN ARREST OF JUDGMENT; AND FOR A NEW TRIAL.

It is well settled that refusal to grant a motion for a new trial is not assignable error, unless an abuse of discretion appears:

Moore vs. U. S., 37. *L. Ed.* 996.
Wheeler vs. U. S., 40 *L. Ed.* 244.
Clune vs. U. S., 40 *L. Ed.* 269.

In the face of the evidence in the case, the overruling of motion for directed verdict was eminently correct, and no authority is needed to support the action of the court in that respect. The reason assigned as the court's error in not sustaining defendant's motion for judgment notwithstanding the verdict, that the names of the Chinese persons referred to in the indictment and evidence were known to the United States District Attorney and the grand jury previous to the return of said indictment and were not set forth in said indictment, is sufficiently covered by the treatment of Points I and II, and the government relies thereon.

The sufficiency of the indictment having been passed upon by the court and the evidence having been properly admitted, the denial of the motion in

arrest of judgment was correct, and is supported by above authorities.

The evidence in the case utterly fails to support the all but specious third point in the argument of counsel for plaintiff in error.

If any doubt should arise as to whether the defendant Dahl was charged with a conspiracy to conspire, or a plain conspiracy to commit an offense in violation of United States laws, we beg leave to refer to *Williamson vs. U. S.* 52 L. Ed. at page 290, paragraph number 1, as to the sufficiency of the indictment, which dissipates an elaboration of the argument insisted upon by plaintiff in error.

The action of the court in overruling the motion in arrest, and for a new trial, was correct.

The defendant was accorded a fair trial and the conviction should be sustained.

Respectfully submitted,

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